

NO. 3099

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IN THE UNITED STATES CIRCUIT COURT  
OF APPEALS

FOR THE  
NINTH CIRCUIT

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MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

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BRIEF FOR PLAINTIFF IN ERROR

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*STATEMENT OF CASE.*

This is an action to quiet title under the Hawaiian statute permitting such an action to be brought as an action at law. (Section 2750, Revised Laws of Hawaii, 1915.) The action was brought in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on the 21st day of September, 1916, and thereafter, on or about the 29th day of September, 1916, an answer of general denial was filed by the defendant, and thereafter, on or about the 2nd day of October, 1916, a stipulation was filed in the Circuit Court wherein it was admitted that plaintiff and defendant had a common source of title; that

plaintiff was a cousin of one, Alexandrina Leihulu, who died intestate on the 23rd day of March, 1914, leaving no children, father or mother, sister or brother, nephew or niece; that prior to her death and on the date set forth in the stipulation, the deceased married Henry N. Clark, the defendant herein. (Transcript of Record on Appeal, pages 24 and 25.)

The said cause came up for trial on the 15th day of February, 1917, in the Circuit Court of the First Judicial Circuit before the Honorable C. W. Ashford, trial by jury having been waived, and at that time proof was made that the plaintiff was the first cousin of the deceased woman commonly known as "Leihulu"; that, by stipulation, it was agreed that the said deceased Leihulu was the owner in fee simple of the land set forth in the complaint.

It was further proved that the plaintiff would be the next of kin of the said deceased, if she had no husband living at the time of her death. (See Transcript of Record on Appeal, pages 56-64.)

The marriage of said deceased to Henry Clark having been admitted by stipulation, the point was made by said plaintiff that the said marriage was invalid for the reason that the said Henry Clark at that time was the husband of another woman, never having been legally divorced, and the records of the alleged divorce between himself and his former wife, Emma H. N. Clark, were offered in evidence. (Transcript of Record on Appeal, pages 35-55.) The Cir-

cuit Judge held that, in view of the decision of the Supreme Court of Hawaii in the case of the *Estate of Clark*, 23 Haw. 451, that the marriage of Clark to the deceased was a legal one and that he was legally her husband, and the bill of the plaintiff be dismissed. From this decision a writ of error was sued out in the Supreme Court of the Territory of Hawaii by the plaintiff, and the Supreme Court on the 1st day of June, 1917, affirmed the decision of the circuit judge. From this decision, plaintiff in error appeals to this Court.

### ARGUMENT.

The plaintiff assigns the following errors in the decision of the Supreme Court of the Territory of Hawaii and presents argument upon both points:

1. That the Court erred in deciding that the divorce of *Emma H. N. Clark vs. Henry Clark*, who it is admitted is the defendant in error, being Divorce No. 4304, was a good and valid divorce, and that said Henry Clark was therefore able to legally marry Alexandrina Leihulu and, by said marriage, was her sole heir at law.

2. That the Court erred in rendering its decision against plaintiff in error and in favor of defendant in error, and further rendering judgment dismissing the complaint of the plaintiff in error and denying that she was the heir at law of Alexandrina Leihulu.

It is admitted, by stipulation and by the testimony

adduced at the trial and not contradicted, that the plaintiff is the nearest heir at law of the deceased, commonly known as Leihulu, if, at the time of her death, there was no husband living. (Section 3246, Revised Laws of Hawaii, 1915.)

It seems that deceased and Henry N. Clark were married on the 6th day of August, 1912, in San Diego, California, and that the deceased died intestate on March 23, 1914. (Transcript of Record on Appeal, pages 24 and 25.) Prior to this time the said Henry N. Clark had been the husband of one, Emma H. N. Clark, who brought suit for divorce against him on the 2nd day of August, 1911, in the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In this suit for divorce, she alleged a long series of acts of alleged cruelty. (Transcript of Record on Appeal, pages 35-41.) On the 3rd day of August, 1911 (erroneously transcribed as the 3rd day of July, 1911), the defendant in person answered the libel for divorce, admitting the jurisdictional facts and denying the other allegations. On the 8th day of August, 1911, the attorney for Mrs. Clark, R. W. Breckons, filed in the said Circuit Court a consent signed by the libellee that the case should be tried on Tuesday, the 8th day of August, 1911, and on the same date, a decree of divorce was granted the libellant from the libellee, the decree showing that the libellee was not present in court.

It further appears from the testimony in the present case that on the 23rd day of October, 1911,



the decree in this case—among others—was set aside and vacated by Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, “for the reason that said decrees, and all thereof, are void and of no force and effect, the same having been entered and rendered in such causes of action prior to the expiration of thirty days from and after service of process or appearance in each of said actions respectively” (Transcript of Record on Appeal, pages 60 and 61), and that thereafter, without any further notice to libellee—there being no record that he was ever apprised that the cause had been re-opened and the record showing that no new summons had been served upon him or any chance been given him to appear—a new decree of divorce was granted on the testimony of the libellant alone and unsupported by any further testimony. (Transcript of Record on Appeal, pages 50-55.)

One cannot escape the fact, from reading the testimony of Mrs. Clark, that the divorce was granted on the flimsiest possible grounds and it was either collusive or arranged in such a manner that the libellee had no opportunity, nor was he summoned to present his side of the case. The very fact that three days after the decree was set aside as void, a new trial was had without notice to the libellee, shows that there was no intention of giving to the case such an examination as should be insisted upon in any matter such as divorce, where not only the

rights of the parties are to be adjudicated, but in which the public have a right to be protected. Under the laws of the Territory of Hawaii, "if there be any reason to suspect collusion or that important testimony can be procured which has not been produced, it shall be the duty of the judge to continue the cause from time to time while such reason for suspicion continues, and the attorney general or other prosecuting officer and parties not of record shall be heard, to establish the fact of collusion or the existence of testimony not produced." (Section 2933, Revised Laws of Hawaii, 1915.)

In this case there was no opportunity given for any such investigation. After the decree was declared void, no notice was given to libellee. No proceeding was instituted whereby the public or the attorney general could have intervened, and no chance was given for any outside testimony to be heard. These facts are uncontradicted and, if said divorce was irregular and void, as it was held to be (see *Markle vs. Markle*, 20 Haw. 633), then a new action could not have been commenced without notice and, if the second divorce was, therefore, irregularly obtained and void for lack of notice to libellee, the said Clark was not free to marry the deceased and was not the legal husband of deceased, never having been legally divorced from his former wife.

It has, however, been suggested that even if said divorce was void, it is not subject to a collateral attack as to its validity and that the only person who



could take advantage of these irregularities and have the matter re-opened would be the husband, the defendant in the present suit. It is respectfully submitted that this is not so; that where the title of real property is involved in the question of heirship, the plaintiff in this case, who has never been before the court and has never had her rights adjudicated, has the right to bring this matter before the court and to prove that said Clark was not in reality the legal husband of the deceased. This was admitted by the Circuit Judge in his decision when he said: "But it is again objected by the plaintiff that the present plaintiff was in no sense a party to any of those proceedings, neither the proceeding of *Clark versus Clark*, Divorce 4304 in this court, nor was she a party to the proceeding in which the Supreme Court rendered that decision, namely, in the matter of the estate of Alexandrina Leihulu Clark, deceased, and that the decision of the Supreme Court in that case did not foreclose her rights. That is absolutely good law; there can be no fault found with that, and I imagine that the defendants do not claim that her rights were foreclosed by that decision." (Transcript of Record on Appeal, page 30.)

If the court is correct in stating that our rights were not foreclosed, plaintiff had a right to present them in an action to quiet title and, as the evidence is undisputed and the proof shows that the allegations in said complaint are correct and that plaintiff is the heir at law on account of the invalidity of the

divorce granted Clark before his marriage to deceased, then judgment should be rendered for the plaintiff in error.

Respectfully submitted,

LORRIN ANDREWS,

WM. B. PITTMAN,

Attorneys for Plaintiff in Error.

Dated, Honolulu, T. H.,

January 30, A. D. 1918.